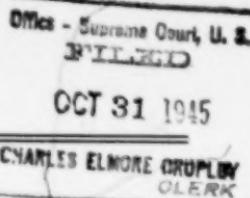


No. 573



IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Estate of HUMPHREY J. LYNCH, deceased, THE
COUNTY TRUST COMPANY and MARY A. FLEM-
ING, Executors,

Petitioners,
against

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

WARNER PYNE,
MONROE J. CAHN,
Counsel for Petitioners.

TABLE OF CONTENTS.

	PAGE
Petition for Writ of Certiorari	1
Summary and Short Statement of the Matter Involved..	2
Nature of Suit and Decisions Below	2
The Questions Presented	5
Reasons Relied upon for Allowance of Writ	6
Brief in Support of Petition	9
Jurisdiction	9
Specification of Errors	10
Statutes and Treasury Regulations Involved	10
Section 22a, Revenue Act of 1928	10
Section 275 (a), Revenue Act of 1928	11
Section 42, Revenue Act of 1938	11
Article 53, Treasury Regulations 74	11
Summary of Argument	12
Argument	12
Point I. Under section 22a of the Revenue Act of 1928 the assignment was income to decedent in 1931	12
Point II. Upon the conceded facts, section 42 of the Revenue Act, both in purpose and by its terms, was inapplicable	19
Conclusion	20
Authorities Cited:	
Estate of Letz, 45 B. T. A. 1011, 1017	19
Helvering v. Enright, 312 U. S. 636	7, 15, 18
Helvering v. Midland M. L. I. Co., 300 U. S. 216 ..	13
North American Oil v. Burnet, 286 U. S. 417 ..	4, 5, 7, 16
Old Colony Trust Company v. Commissioner of In- ternal Revenue, 279 U. S. 716	13
Putnam v. Commissioner, 323 U. S., 89 L. Ed. 734, 736	19
U. S. v. Safety Car Heating Co., 297 U. S. 88	5, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Estate of HUMPHREY J. LYNCH, deceased, THE
COUNTY TRUST COMPANY and MARY A. FLEM-
ING, Executors,

Petitioners,

against

THE COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioners, The County Trust Company and Mary A. Fleming, as executors under the last Will and Testament of Humphrey J. Lynch, deceased, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court affirming (Judge Swan dissenting) a determination of the Tax Court of the United States sustaining a deficiency income tax assessment against decedent.

The opinion of said court was filed on August 7th, 1945,
and is reported in 150 Fed. (2d) 747.

A transcript of the record, including the proceedings in the said Circuit Court of Appeals, is furnished herewith in accordance with rule 38 of this Court.

Summary and Short Statement of the Matter Involved.

Nature of Suit and Decisions Below.

The facts which are not in dispute are fully set forth in the prevailing opinion of Judge Augustus N. Hand below and may briefly be summarized as follows:

In 1931, decedent, an attorney, practicing in White Plains, New York, in payment and discharge of a fee in the sum of \$5000 owing to him by his clients, the Misses Margueritte H. Lynch, Elizabeth F. Lynch and Anna L. Lynch (not related to decedent), for services rendered to them in establishing claims in their behalf in the total sum of \$56,160 against the estate of one John H. McArdle, deceased, took an assignment of those claims to the extent of \$5000.

The claims were established against the said estate of John H. McArdle, deceased, in an accounting proceeding in the Surrogate's Court of Westchester County by a decree of that court, dated October 30th, 1931, in which decree the court found the assets of the said estate at the date of McArdle's death to have been \$400,920.10 and the liabilities, including the claims of the Misses Lynch, \$139,780, leaving an apparent surplus of \$261,139.90.

The executors of the McArdle estate appealed from so much of the decree as established the claims of the Misses Lynch and they appealed from other portions of the decree adverse to them. Both appeals were subsequently withdrawn, the precise date of which the record does not show

(cf. Record, pp. 25, 32). However, the record does show that on February 2nd, 1935, decedent herein waived his right to receive a dividend then about to be paid on the claims of the Misses Lynch in the sum of \$1,839.50 so that they themselves might receive it (Record, pp. 24, 30).

In 1933, the McArdle estate became insolvent as the result of the failure of a national bank, a substantial block of the stock of which was one of the principal assets of the McArdle estate. Nevertheless in 1940, two years after the death of decedent herein on January 24th, 1938, decedent's estate received from the McArdle estate payment in full of the \$5000 assignment.

Decedent, who was on a cash basis, never included the \$5000 fee in any income tax return. Petitioners herein filed a return for him for the period from January 1st, 1938 to January 24th, 1938, on which latter date, as stated, he died. In auditing said return, respondent included the \$5000 fee as accrued income and assessed a deficiency tax of \$484.21 by reason thereof (Record, p. 7).

Petitioners duly sought review by the Tax Court of the United States, which affirmed the Commissioner. Petition for review to the United States Circuit Court of Appeals for the Second Circuit followed.

The position taken by petitioners throughout may be thus simply stated:

Inasmuch as the assignment was taken by decedent in 1931 in payment and absolute discharge of the fixed debt due him for his services, under the clear and comprehensive language of section 22a of the Revenue Act of 1928

defining income as including "compensation for personal service, of whatever kind and in whatever form paid, or from professions * * *," the assignment constituted income to decedent in that year, the value of which was presumptively fixed at the sum of \$5000 by virtue of the provisions of Article 53 of Treasury Regulation 74, then in effect, reading as follows:

"Art. 53. Compensation paid other than in cash.—Where services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. If the services were rendered at a stipulated price, in the absence of evidence to the contrary such price will be presumed to be the fair value of the compensation received. * * *"

Having thus been paid and discharged in 1931, under no circumstances could the fee owing from the Misses Lynch be deemed to be owing at the date of decedent's death on January 24th, 1938 as the Commissioner assumed, and treated as accrued income within the meaning of section 42 of the Revenue Act of 1938.

The Tax Court, although finding that the debt had been paid by the acceptance of the assignment, nevertheless sustained the Commissioner on the ground (Record, p. 16) that it was unable to find that at the date of decedent's death or at any time prior thereto the assignment had any market value, though there is no provision of the Revenue Act which makes market value a test of income.

The Circuit Court of Appeals ignored both of the previous reasons and upheld the deficiency upon two grounds, (a) that the decisions of this court in *North American Oil*

v. Burnet, 286 U. S. 417, and *U. S. v. Safety Car Heating Co.*, 297 U. S. 88,

"require us to hold that no income was realized or accrued while the appeals from the Surrogate's decree were pending.",

and (b) that

"the assignment, though taken in payment, should (not) be regarded as property within the meaning of the income tax law."

In his dissenting opinion, Judge Swan took the view that "Neither the Tax Court's theory nor my colleagues' seems to me consonant with the statutory mandate that 'compensation * * * in whatever form paid' be included in the attorney's income for the year of payment—in the case at bar 1931."

and further that, upon the proof, the assignment had at least some value in 1931 and that such value in 1931 should have been returned as income in that year and any sum in excess of such value realized in 1940, when cash of \$5000 was received, should have been reported as a gain realized on an asset of decedent's estate.

The Questions Presented.

1. Was an assignment by clients of a part of claims against a third party taken by an attorney in full payment of a fixed debt for legal services income, in the year received, 1931, to the attorney, on a cash basis, under section 22a of the Revenue Act of 1928?
2. What was the effect upon and application to the situation stated in question 1 of Article 53 of Treasury Regulation 74 applicable to the 1928 Act (section 29.22(a)-3 of present Treasury Regulation No. 111)?

3. In the situation stated in question 1, did the pendency of an appeal from a decree establishing the validity of the claims prevent the assignment of part thereof from being income in 1931 within the meaning of said section 22a?

4. In the situation stated in question 1, was the assignment "property" within the meaning of said section 22a?

5. Where a fixed debt for legal services was paid in 1931 by the acceptance by the attorney, on a cash basis, of an assignment of part of claims due the clients from a third party, which partial assignment was not paid by the time of the death of the attorney in 1938, was either the original fixed debt due to the attorney from the clients or the assignment properly treated as accrued income to the deceased attorney and includible in his taxable income for the period in which fell the date of his death, under section 42 of the Revenue Act of 1938?

6. In the situation stated in question 5, did the fact that the attorney in 1935 might have received but waived part payment on account of his assignment, prevent the application of said section 42 in 1938?

Reasons Relied Upon for Allowance of Writ.

We believe that the decision below should here be reviewed because

(1) There is involved important questions of the meaning, scope and application of section 22a of the Internal Revenue Code since it is identical with section 22A of the

Act of 1928 insofar as that section is here applicable. As Judge Swan said:

"Although the amount of tax involved in this litigation is small, the principles involved appear of sufficient importance to justify a brief statement of my reasons for disagreement with the majority opinion".

(2) The first ground of the majority opinion below stated to be required by the decisions of this Court quoted therein is directly contrary to the first of said decisions (*North American Oil v. Burnet*) and finds no support in the second.

(3) In failing to hold that the precise value of the assignment in 1931 was irrelevant to the question of taxability in 1931, the controlling decision of this Court in *Helvering v. Enright*, 312 U. S. 636, has been ignored.

Since the questions (a) what constitutes income and (b) when such income is taxable are of major importance in the administration of the income tax laws, they should be decided by the decision of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court for hearing and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered 296, October Term, 1944, entitled Estate of Humphrey J. Lynch, deceased, The County Trust Company and Mary A. Fleming, Executors, petitioners, against Commissioner of Internal Revenue, respondent,

and that the said judgment of the United States Circuit Court of Appeals for the Second Circuit be reversed by this honorable Court and that your petitioners may have such other and further relief in the premises as to this honorable Court may seem meet and just, and your petitioners will ever pray, etc.

Dated, October 15th, 1945.

ESTATE OF HUMPHREY J. LYNCH,
THE COUNTY TRUST COMPANY and MARY
A. FLEMING, as Executors,
By WARNER PYNE,
MONROE J. CAHN,
Counsel for Petitioners.